Rasoul Bagherbejandi Ahmad v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05–158–06 OF 2012 AND W-05–159–06 OF 2012
ZAKARIA SAM, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI JJCA
2 OCTOBER 2015

Criminal Procedure — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in hotel room — Whether trial judge erred in finding that prosecution had proven prima facie case of trafficking against both appellants on charge of trafficking in dangerous drugs — Whether trial judge failed to properly evaluate whether unsworn statements of both appellants created reasonable doubt upon prosecution's case — Whether both appellants were in possession of impugned drugs pursuant to a common intention — Whether discovery of drugs in two different locations gave rise to two different factual matrixes

Evidence — Statement — Unsworn statement — Weight to be attached to — Whether statements raised reasonable doubt in prosecution's case

Acting on information received a police team raided a hotel room in the Corus Hotel, Kuala Lumpur. The police team gained entry into the hotel room, when the third accused opened the door. Upon gaining entry the police team found the first appellant sitting on a bed in the room and the second appellant standing on the toilet bowl in the bathroom hiding something in the ceiling of the bathroom. When the hotel room occupied by the two appellants, who were both Iranians, was searched, the police team recovered a plastic bag containing 112 plastic capsules in a drawer of the television cabinet and another plastic bag containing 112 similar plastic capsules hidden in the ceiling of the bathroom. The contents of the two plastic bags were later analysed by the chemist and confirmed to be methamphetamine, a dangerous drug under the Dangerous Drugs Act 1952 ('the Act'), weighing a total of 1,181g. Both the appellants and the third accused were arrested and brought to the police station. While in custody the appellants complained of stomach ache and were taken to the hospital. An x-ray examination of both appellants' abdomen showed the presence of foreign objects in their stomachs. Another further 11 plastic capsules, which were later recovered from the appellants' bowel movements, were also analysed by the chemist and confirmed to be 27g of methamphetamine. The two appellants and the third accused were jointly charged with having a common intention of trafficking in 1,181g of

methamphetamine, an offence under s 39B(1)(a) of the Act. The two appellants were also charged of possession of the drugs they had discharged in their excreta. At the end of the prosecution's case, the trial judge found that a prima facie case had been made out as against both the appellants in respect of the trafficking offence and ordered them to enter their defence, but acquitted the third accused. In their similar unsworn statements from the dock both appellants claimed that they had been invited to Malaysia to stay in the Corus Hotel and that after they had checked into their hotel room the second appellant's friend had arrived and introduced them to the third accused. It was the appellants' defence that it was the third accused, who had brought the drugs into the room. The appellants also claimed that they had swallowed several plastic capsules given to them by the third accused because they had believed the latter's assurance that the same were medicine that could give them energy. At the end of the trial the trial judge found that the appellants' defence failed to create any reasonable doubt upon the prosecution's case and that the prosecution had proven the proffered charge of trafficking against the appellants beyond a reasonable doubt. Consequently the appellants were convicted and sentenced to death. The present appeals were in respect of these convictions and sentences. The appellants' common ground of appeal was that the trial judge had failed to properly evaluate whether the unsworn statements of both appellants had created a reasonable doubt upon the prosecution's case.

Held, dismissing the appeals:

(1) The fact that both appellants were in full control and management of the hotel room and were joint occupiers of the said room at the material time was clear evidence that both the appellants had in their custody and control the two plastic bags containing the drugs found in the hotel room. Although custody or control is not sufficient to prove possession, both the appellants were so situated to the drugs that they had the power to deal with it to the exclusion of all other persons. There was also overwhelming evidence of a common intention by both appellants to commit the trafficking offence. The first appellant was sitting on a bed close to where the first plastic bag was found, whilst from the conduct of the second appellant in hiding the drugs in the ceiling of the bathroom when he was arrested it could be safely inferred that he had full knowledge of the contents of the plastic bag he was hiding. Further both appellants had excreted the same type of drugs in capsules, which fact could not be divorced from the factum of the discovery of the drugs in the two plastic bags in the room. Hence, on the facts and circumstances of the case it was obvious that prima facie both the appellants had possession of the drugs seized independently of the statutory presumption under s 37(d) of the Act. In view of the large quantity of drugs seized (1,181g) the drugs could not have been for their own consumption but clearly for the purpose of trafficking. Thus, the trial judge was correct in finding that

the prosecution had proven a prima facie case against both appellants on the charge of trafficking in the said drugs (see paras 8–17).

(2) Given that an unsworn statement was not subject to cross-examination by the prosecution, it would follow that such a statement would carry little weight evidentially. At the end of the day the statement would need to be evaluated by the trial judge as to whether it created a reasonable doubt in the prosecution's case. In the present case, the evaluation of the said statements by the trial judge was indeed rather cursory. Be that as it may, the evidence was overwhelming to support the findings of the trial judge that no reasonable doubt had been created by the defence. Upon re-evaluating both the appellants' unsworn statement it was found that these statements were most unsatisfactory and unconvincing. As such, they were incapable of being given any weightage let alone raising a reasonable doubt. Both appellants had canvassed a very opportunistic defence by taking full advantage of the third accused's acquittal at the end of the prosecution's case and heaped the entire culpability upon the third accused. It was certainly a defence of afterthought and concoctions crafted upon the acquittal of the third accused. Their defence was neither consistent with their innocence nor were there circumstances corroborating their statements to warrant judicial attention (see paras 27–28, 31–36 & 41–42).

(3) Although the drugs were found at two different locations, namely the drawer of the TV cabinet and the ceiling of the bathroom, this did not give rise to two different factual matrixes, with each factual matrix to be considered separately the trial judge. The discovery of the drugs, which was so proximate in terms of time and location, should constitute and be considered as one factual transaction. There was only one factual matrix of the case and there was no necessity to have a separate consideration of the same as submitted by the first appellant (see paras 44–47).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima sepasukan polis telah menyerbu sebuah bilik hotel di Hotel Corus, Kuala Lumpur. Pasukan polis dapat memasuki dalam bilik hotel, apabila tertuduh ketiga membuka pintu. Setelah dapat masuk pasukan polis mendapati perayu pertama duduk atas katil dalam bilik itu dan perayu kedua berdiri di atas mangkuk tandas dalam bilik air menyembunyikan sesuatu dalam siling bilik air. Apabila bilik hotel didiami oleh dua perayu tersebut, yang mana kedua-duanya warganegara Iran, telah diperiksa, pasukan polis telah menemui beg plastik mengandungi 112 kapsul plastik dalam laci kabinet televisyen dan satu lagi beg plastik mengandungi 112 kapsul plastik yang serupa tersembunyi dalam siling bilik air itu. Kandungan dua beg plastik itu kemudian telah dianalisis oleh ahli kimia dan disahkan dadah methamphetamine, dadah berbahaya di bawah Akta Dadah Berbahaya 1952 ('Akta tersebut'), yang berat keseluruhan adalah 1,181g. Kedua-dua

perayu dan tertuduh ketiga telah ditangkap dan dibawa ke balai polis. Semasa dalam tahanan perayu-perayu mengadu sakit perut dan dibawa ke hospital. Pemeriksaan x-ray menunjukkan terdapat objek asing dalam perut mereka. 11 kapsul plastik lagi, yang telah diperoleh daripada pembuangan air besar perayu-perayu, juga telah dianalisis oleh ahli kimia dan disahkan dadah methamphetamine seberat 27g. Kedua-dua perayu dan tertuduh ketiga dituduh bersama dengan niat sama mengedar 1,181g methamphetamine, satu kesalahan di bawah s 39B(1)(a) Akta tersebut. Kedua-dua perayu juga dituduh memiliki dadah yang telah dikeluarkan melalui najis mereka. Di akhir kes pendakwaan, hakim perbicaraan mendapati bahawa kes prima facie telah dibuktikan terhadap kedua-dua perayu berkaitan kesalahan kesalahan pengedaran dan memerintahkan mereka memasukkan pembelaan mereka, tetapi telah membebaskan tertuduh ketiga. Dalam kenyataan tidak bersumpah mereka yang sama dari kandang saksi, kedua-dua perayu mendakwa bahawa mereka telah dijemput datang ke Malaysia untuk tinggal di Hotel Corus dan bahawa selepas mereka masuk ke bilik hotel mereka kawan perayu kedua telah tiba dan memperkenalkan mereka kepada tertuduh ketiga. Ia adalah pembelaan perayu-perayu bahawa tertuduh ketiga yang telah membawa dadah itu ke dalam bilik. Perayu-perayu juga mendakwa bahawa mereka telah menelan beberapa kapsul plastik yang diberikan kepada mereka oleh tertuduh ketiga kerana mereka mempercayai jaminan tertuduh ketiga yang kapsul-kapsul plastik itu adalah ubat yang boleh memberikan mereka tenaga. Di akhir perbicaraan hakim perbicaraan mendapati bahawa pembelaan perayu-perayu gagal menimbulkan apa-apa keraguan munasabah ke atas ke pendakwaan dan bahawa pendakwaan telah membuktikan pertuduhan pengedaran yang dibuat terhadap perayu-perayu melampaui keraguan munasabah. Dengan itu perayu-perayu telah disabitkan dan dihukum mati. Rayuan-rayuan ini adalah berkaitan sabitan-sabitan dan hukuman-hukuman tersebut. Alasan rayuan yang sama perayu-perayu adalah bahawa hakim perbicaraan telah gagal menilai sewajarnya sama ada kenyataan-kenyataan tidak bersumpah kedua-dua perayu telah menimbulkan keraguan munasabah ke atas kes pendakwaan.

Diputuskan, menolak rayuan-rayuan:

(1) Hakikat bahawa kedua-dua perayu mempunyai kawalan dan pengurusan penuh bilik hotel itu dan merupakan penghuni bersama bilik tersebut pada masa matan adalah bukti jelas bahawa kedua-dua perayu mempunyai jagaan dan kawalan mereka dua beg plastik yang mengandungi dadah yang telah dijumpai dalam bilik hotel itu. Walaupun jagaan atau kawalan tidak mencukupi untuk membuktikan milikan, kedua-dua perayu agak dekat dengan dadah itu untuk mereka mempunyai kuasa menguruskannya dengan mengecualikan semua orang lain. Terdapat juga keterangan yang banyak berhubung niat bersama oleh kedua-dua perayu untuk melakukan kesalahan

pengedaran. Perayu pertama sedang duduk di atas katil berdekatan dengan beg plastik pertama dijumpai, manakala berdasarkan perlakuan perayu kedua menyembunyikan dadah dalam siling bilik air itu apabila dia ditangkap maka ia selamat untuk disimpulkan bahawa dia mempunyai pengetahuan tentang kandungan beg plastik yang disembunyikannya. Selanjutnya kedua-dua perayu telah mengumuhkan dadah jenis yang sama dalam kapsul dari kumuhan, yang mana tidak boleh dipisahkan daripada fakta penemuan dadah dalam dua beg plastik dalam bilik itu. Justeru, berdasarkan fakta dan keadaan kes adalah jelas bahawa secara prima facie kedua-dua perayu mempunyai milikan dadah yang dirampas secara berasingan berdasarkan andaian statutori di bawah s 37(d) Akta tersebut. Berdasarkan kuantiti besar dadah yang dirampas (1,181g) dadah itu tidak mungkin untuk kegunaan mereka sendiri tetapi jelas bagi tujuan pengedaran. Oleh itu, hakim perbicaraan adalah betul kerana mendapati pendakwaan telah membuktikan kes prima facie terhadap kedua-dua perayu atas pertuduhan pengedaran dadah tersebut (lihat perenggan 8–17).

(2) Memandangkan kenyataan tidak bersumpah tidak tertakluk kepada pemeriksaan balas oleh pendakwaan, adalah diikuti bahawa kenyataan sedemikian hanya memberi kesan yang sedikit ke atas keterangan. Akhirnya kenyataan itu perlu dinilai oleh hakim perbicaraan sama ada ia mewujudkan keraguan munasabah terhadap kes pendakwaan. Dalam kes ini, penilaian ke atas kenyataan tersebut oleh hakim perbicaraan sememangnya tidak teliti. Oleh itu, keterangan agak banyak untuk menyokong penemuan hakim perbicaraan bahawa tiada keraguan munasabah telah ditimbulkan oleh pembelaan. Setelah meneliti semula kenyataan tidak bersumpah kedua-dua perayu adalah didapati bahawa kenyataan-kenyataan tersebut agak tidak memuaskan dan tidak meyakinkan. Oleh itu, mereka tidak mampu memberi apa-apa kesan apatah lagi menimbulkan keraguan munasabah. Kedua-dua perayu telah mengemukakan pembelaan yang bersifat oportunist dengan mengambil kesempatan sepenuhnya pembebasan tertuduh ketiga di akhir kes pendakwaan dan meletakkan keseluruhan kebersalahan ke atas tertuduh ketiga. Pembelaan mereka tidak konsisten dengan kejujuran mereka ataupun terdapat keadaan yang menyokong kenyataan-kenyataan mereka untuk mewajarkan perhatian kehakiman (lihat perenggan 27–28, 31–36 & 41–42).

(3) Walaupun dadah tersebut ditemui di dua lokasi berbeza, iaitu dalam laci kabinet televisyen dan siling bilik air, ini tidak mewujudkan dua matriks faktual yang berbeza, di mana setiap matriks faktual perlu dipertimbangkan secara berasingan oleh hakim perbicaraan. Penemuan dadah itu, yang hampir dari segi masa dan lokasi, hendaklah membentuk dan dianggap satu transaksi faktual. Hanya satu matriks faktual kes dan tiada keperluan untuk pertimbangan berasingan bagi sesuatu yang sama

seperti mana dikemukakan oleh perayu pertama (lihat perenggan 44–47).]

Notes

For a case on unsworn statement, see 7(2) *Mallal's Digest* (5th Ed, 2015) para 3204.

For cases on trafficking, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 2037–2044.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)
Hari Ram v State of Uttar Pradesh [2004] 3 LRI 523, SC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Sanassi [1970] 2 MLJ 198 (refd)
Suresh v State of Uttar Pradesh AIR 2001 SC 1344, SC (refd)
Wong Heng Fatt v PP [1958] 1 LNS 96, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 39A(1), 39B(1)(a), (2)
Penal Code s 34

Appeal from: Criminal Trial No 45–88 of 2010 (High Court, Kuala Lumpur)

Kuldeep Kumar (Atari Bahardin with him) (J Kuldeep Kumar & Co) for the first appellant.
Tina Ong (Sivananthan) for the second appellant.
Munahyza Mustapha (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] In the court below, the appellant in Criminal Appeal No W-05–158–06 of 2012 ('the first appellant') and the appellant in Criminal Appeal No W-05–159–06 of 2012 ('the second appellant') with one Behnam Asgarieh Naser, who has since been acquitted and discharged at the end of the prosecution's case ('the third accused'), were charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same, as follows:

Bahawa kamu pada 15.4.2010, jam lebih kurang 4.25 petang, di bilik No. 323, Hotel Corus, Kuala Lumpur, dalam Daerah Dang Wangi, di dalam Bandar Raya Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya, iaitu methamphetamine seberat 1181 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952, yang boleh dihukum di bawah seksyen 39(B)(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] Additionally both the appellants were each charged with a second offence under s 12(2) of the Act and punishable under s 39A(1) of the same.

The second charge against the first appellant reads:

Bahawa kamu di antara 16.4.2010 jam lebih kurang 8.22 malam sehingga 17.4.2010 jam lebih kurang 7.00 pagi, di tandas pesakit Wad Separa Kritikal Hospital Kuala Lumpur, dalam Daerah Dang Wangi di dalam Bandar Raya Kuala Lumpur, Wilayah Persekutuan, telah memiliki dadah berbahaya iaitu methamphetamine seberat 27.5 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952, yang boleh dihukum di bawah s 39A(1) Akta yang sama.

The second charge against the second appellant is as follows:

Bahawa kamu di antara 16.4.2010 jam lebih kurang 8.22 malam sehingga 17.4.2010 jam lebih kurang 7.00 pagi, di tandas pesakit Wad Separa Kritikal Hospital Kuala Lumpur, dalam Daerah Dang Wangi di dalam Bandar Raya Kuala Lumpur, Wilayah Persekutuan, telah memiliki dadah berbahaya iaitu methamphetamine seberat 27.0 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952, yang boleh dihukum di bawah s 39A(1), Akta yang sama.

[3] At the end of the prosecution's case, the learned trial judge found that a prima facie case has been made out as against both the appellants in respect of the trafficking offence under s 39B(1)(a) of the Act. Both appellants were ordered to enter their defence and at the end of the day, were found guilty and convicted of the same and sentenced to death. The appeals before us were in respect of these convictions and sentences.

[4] The third accused was acquitted and discharged at the end of the prosecution's case on account that no prima facie case has been made out against him. There is no appeal in respect of the third accused's acquittal by the public prosecutor.

[5] Both appellants were also respectively found guilty and convicted of the offence of possession under s 12(2) of the Act and accordingly sentenced to

three years imprisonment pursuant to s 39A(1) of the same. There is also no appeal by either party in respect of these convictions and sentences.

THE PROSECUTION'S CASE

[6] The narratives were as follows:

(a) upon information received, ASP Mohd Ashril bin Md Johar ('SP11') and his team raided room No 332, Corus Hotel, Kuala Lumpur. After knocking the door several times, the door of the room was opened by the third accused;

(b) SP11 immediately entered the room. He saw the second appellant standing on the toilet bowl in the bathroom putting/hiding something in the ceiling of the bathroom. SP11 then instructed his team members to immediately arrest the second appellant. In the meantime he saw the first appellant sitting on the bed in the room;

(c) SP11 then inspected the room. He found in the lowest (third) drawer of the television cabinet, one translucent plastic bag (exh P3A) containing 112 plastic capsules (exhs P3B1–P3B112) suspected to contain drugs;

(d) additionally SP11 found a similar plastic bag (exh P4A) containing 112 similar plastic capsules (exhs P4B1–P4B112) hidden in the ceiling of the bathroom above the toilet bowl;

(e) both the appellants and the third accused were arrested and brought to the Kuala Lumpur Police Headquarters together with the suspected drug exhibits and later handed over to the investigating officer ('IO'), Insp Kahar bin Kifli ('SP12');

(f) whilst in custody at the police station, both the appellants complained of stomach ache. Both were then taken to Kuala Lumpur Hospital. Upon an x-ray examination of both the appellants' abdomen, the radiologist, Dr Wan Mazlina bt Wan Zakaria ('SP3') noticed the presence of foreign objects in both the appellants' stomach;

(g) both the appellants were admitted to *Wad Separa Kritikal* of the hospital. The first appellant later discharged six plastic capsules (exhs P5B1–P5B6) and the second appellant discharged five plastic capsules (exhs P6B1–P6B5) respectively from their bowel movements. Each of these 11 plastic capsules were also suspected to contain drugs and were later handed to SP12;

(h) on 22 June 2010, SP12 sent all the suspected drug exhibits to the government chemist, Zulkefli bin Mohd Edin ('SP4'). Upon analysis, SP4 found and confirmed that the 112 plastic capsules P3B1–P3B112 (found inside the third drawer of the TV cabinet) contained 534g of methamphetamine and the 112 plastic capsules P4B1–P4B112 (found

concealed in the ceiling above the toilet bowl in the bathroom) contained 647g of methamphetamine ('the said drugs'). These findings formed the basis of the first charge; and

(i) SP4 also found and confirmed that the six plastic capsules P5B1–P5B6 (discharged through the first appellant's bowel movements) contained 27.5g of methamphetamine and the five plastic capsules P6B1–P6B6 (discharged through the second appellant's bowel movements) contained 27g of methamphetamine. These findings formed the basis of the second charge levelled against both the appellants individually.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[7] The learned trial judge took into account that the hotel room was registered under the first appellant's name; that SP10 had confirmed that the first appellant and another person were staying in the room; that the clothings of both appellants were in the room; that the second appellant was seen standing on the toilet bowl trying to conceal the plastic bag P4A containing the said drugs in 112 capsules in the ceiling; that the plastic bag P3A containing drugs in 112 capsules was found from inside the third drawer of the TV cabinet in the room; and that both appellants did excrete the same type of drugs in capsules of similar shapes as those recovered from plastic bags P3A (from the third drawer) and P4A (from the ceiling), concluded (at p 10, *Jld* 1, *rekod rayuan*):

> Saya dapati satu-satu rumusan dari fakta ini adalah OKT-1 dan OKT-2 bersama-sama mempunyai penjagaan, kawalan atas dadah yang berada dalam bilik No. 332. Kedua-dua mereka juga mengetahui kewujudan dadah tersebut. Dengan lain perkataan kedua-dua mereka mempunyai milikan bersama atas semua dadah yang dirampas dari bilik No. 332 tersebut. Melihat kepada jumlah yang dirampas, tidak syak lagi OKT-1 dan OKT-2 mempunyai niat yang sama untuk mengedar dadah tersebut.

It is apparent that the learned trial judge found that both appellants have mens rea possession of the said drugs and grounded upon its quantity which is rather huge, the only inference to be made is that the same were for the purpose of trafficking within the meaning of s 2 of the Act and thus a prima facie case was proven against both the appellants (in respect of the first charge).

[8] We have no quarrel with the aforesaid findings by the learned judge. On the incontrovertible facts as found by the learned judge enumerated in para 7 above, both the appellants indeed were in full control, management, have exclusive use and sole access to the room at the material time. They were the joint occupiers of the said room albeit from the moment the first appellant registered himself at the hotel, took the keys of the room and occupied the room with the second appellant thereon.

[9] Hence there is clear evidence that both the appellants were having in their custody or control of the two plastic bags (exhs P3A and P4A) containing the said drugs (exhs P3B1–P3B112) and (P4B1–P4B112) found in the room.

[10] Custody or control alone is not sufficient to prove possession for the purpose of the Act. There has to be established knowledge of such drugs by the appellants. However knowledge, in the absence of an express admission, cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances and the possible variety of circumstances which will support such inference is infinite (see – Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 at p 239.

[11] Now, the second appellant was seen by both SP8 and SP11 standing on the toilet bowl in the bathroom trying to hide something in the ceiling of the bathroom. He was arrested forthwith and when the police searched the ceiling above the toilet bowl, they found the said plastic bag (exh P3A) containing the said drugs.

[12] From the said conduct of the second appellant, in the absence of any reasonable explanation to account for the same, it can be safely inferred that he has full knowledge of the contents of the said plastic bag. Meanwhile the first appellant was sitting on bed, rather close to where the plastic bag (exh P4A) was found in the third drawer of the TV cabinet.

[13] Both the appellants were charged with common intention under s 34 of the Penal Code to commit the crime. The section is intended to make a person liable for the commission of an offence not committed by him but by another person with whom he shared the common intention. It is also to deal with cases in which it is difficult to prove exactly what part was played by each of them in the commission of the offence or in cases where it is difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all (see – *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC).

In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, Sethi J speaking for himself and Agrawal J, said:

> Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the

course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

On the facts we were with the learned judge that there were overwhelming evidence of the existence of a common intention by both the appellants to commit the offence in furtherance of such intention.

[14] Additionally, we found that both the appellants were so situated to the drugs that they have the power to deal with it to the exclusion of all other persons, and when the circumstances are such that they may be presumed to intend to do so in case of need – see *Chan Pean Leon v Public Prosecutor*. The fact that both the appellants excreted the same type of drugs in capsules of similar shapes, which we think cannot be divorced from the factum of the discovery of the drugs in the two plastic bags in the room, merely fortified our view that both the appellants knew exactly the nature of the drugs in the said two plastic bags.

[15] On the facts and circumstances of this case, we came to a finding that prime facie both the appellants have possession of the said drugs independently of the statutory presumption under s 37(d) of the Act.

[16] It is very apparent that both the appellants were keeping the said drugs in the room. In view of its large quantity (1181g), we opined with certainty that the said drugs were not for their own consumption. It is clearly for the purpose of trafficking (see – *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64. Verily the act of both the appellants in keeping the said drugs in such quantity falls squarely within the ambit of trafficking as defined in s 2 of the Act.

[17] Hence we were with the learned judge that the prosecution has indeed proven a prima facie case against both the appellants on the proffered charge of trafficking in the said drugs (first charge).

THE CASE FOR THE DEFENCE

[18] Both the appellants gave unsworn statements from the dock. Their statements were almost identical, in particular the role played by the third accused.

[19] The first appellant posited the following:

(a) he was 27 years old and came from Tehran, Iran;

(b) he came to Malaysia on 15 April 2010 with his friend, the second appellant whom he had known for a long time;

(c) earlier in January 2010, the second appellant had invited him to come along to Kuala Lumpur for a holiday. He accepted the invitation as he has not been to Malaysia;

(d) upon arrival in Kuala Lumpur, the second appellant told him his friend had asked him to stay in Corus Hotel;

(e) both of them went to Corus Hotel. He went to the reception and took room No 332. The room was registered under his name. Then the second appellant informed his friend that they were in the hotel;

(f) about an hour later, somebody knocked the door. The second appellant opened the door and saw the second appellant's friend at the door. He was introduced to him as Behnam (the third accused);

(g) when Behnam entered the room, he saw him carrying some plastic bags. While chatting, Behnam showed to both of them the plastic bag containing some capsules and told them that the capsules were medicine from Malaysia;

(h) Behnam requested them to take the medicine with them when they go back to Iran and pass it to his family. When asked the need to bring back the medicine to Iran, Behnam told them that the medicine would give energy to people who are really tired and this medicine could only be found in Malaysia. Behnam asked them to try for themselves;

(i) both the appellants decided to try it as suggested by Behnam. Behnam gave each of them six capsules to take and told them to keep the capsules in a safe place before going out of the hotel;

(j) then they went to the toilet and put the plastic bag in the toilet roof (ceiling?);

(k) as Behnam was trying to hide another plastic bag, the second appellant suddenly stole his (first appellant's) pill and went into the toilet;

(l) they chatted while waiting for the second appellant to come out of the toilet. Ten minutes later somebody knocked the door. Behnam was worried and put some plastic bags inside the drawer;

(m) when Behnam opened the door, some people claiming to be policemen entered into the room. All three of them were arrested. The police searched the room and found the medicine in the toilet; and

(n) the police showed them the medicine but he could not explain anything because he did not know anything about the medicine.

[20] The second appellant meanwhile posited:

(a) he was 37 years old and came from Tehran, Iran;

(b) in January 2010, his friend, Behnam (the third accused), who was in Malaysia at that time, invited him to come to Kuala Lumpur for a holiday. He accepted the invitation and brought along the first appellant, whom he had known for a long time, to Kuala Lumpur;

(c) on 15 April 2010, he arrived in Malaysia with the first appellant. Upon arrival at the airport, he contacted the third accused and was told to take a taxi to Corus Hotel;

(d) at the hotel, the first appellant booked a room and was given Room 332. He then contacted the third accused and told him they were in Room 332. The third accused told him he will be there in an hour;

(e) the third accused arrived at the hotel and went into their room. He brought a bag with him and placed the bag beside the bed on the floor;

(f) he introduced the third accused to the first appellant. Both he and the first appellant informed the third accused that they were really tired when the third accused offered to take both of them out and show Kuala Lumpur city that night;

(g) at this point the third accused introduced them to a medicine which he said would give them energy and asked them to try for themselves;

(h) the medicine was in the form of capsules. The third accused gave six capsules to each of them. Both the appellants decided to try it for themselves and took (swallowed) the medicine;

(i) after that the third accused requested them to take the medicine with them when they go back to Iran and pass it to his family. The third accused also told them the medicine was expensive in Iran;

(j) the third accused also asked them to keep the capsules in a safe place before going out of the hotel. The third accused also placed the plastic bag in the ceiling in the toilet;

(k) after that he went to the toilet as he had stomach ache. Subsequently he heard some people coming into the room and someone knocked on the toilet door. When he came out of the toilet, all three of them were arrested;

(l) the police then searched the room and found one plastic bag in the drawer and the plastic bag which was placed by the third accused in the ceiling in the toilet;

(m) he was asked by the police regarding the capsules to which he told them he took five of them;

(n) he could not communicate with the police as he did not understand the language and could not inform them that the medicine belonged to the third accused. All three of them were taken to the police station; and

(o) he affirmed that he did not know that the medicine contained drugs and that he was a simple person.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE DEFENCE CASE

[21] The learned trial judge opined that both the appellants were not simpletons (*Pak Pandir*) as they would want the court to believe them to be on account that they have travelled thousands of miles from Tehran to Malaysia, managed to take a taxi from the airport to the hotel and managed to book a room at the hotel. The falsity of their defence could not be ascertained through cross-examination as they have opted to give statements from the dock. The evidence showed that it was the second appellant who had attempted to conceal the drugs in the ceiling of the bathroom and not the third accused.

[22] He found that the defence of both the appellants pertaining to the first charge failed to create any reasonable doubt upon the prosecution's case and that the prosecution has succeeded to prove their case beyond a reasonable doubt against both the appellants.

THE APPEALS BEFORE US

[23] Learned counsel for both the appellants were on common ground and submitted that the learned judge had failed to properly evaluate whether the unsworn statements of both appellants have created a reasonable doubt upon the prosecution's case. Counsel for the first appellant further submitted that the learned judge erred in considering the first appellant's unsworn statement as untrue and false only because it was not subjected to cross-examination.

[24] Meanwhile counsel for the second appellant fortified his position by contending that the learned judge had failed to consider that the core of the appellants' defence was that the drugs belonged to the third accused. If the drugs belonged to both appellants as alleged and they had indeed carried those drugs with them from Iran to Malaysia, they would have been discovered at the airport itself when going through the customs scanners. A favourable inference must be drawn that the drugs were given to them by someone while they were already in Kuala Lumpur and that someone clearly points to the third accused who had hidden the plastic bag in the ceiling of the toilet.

[25] From the onset we would like to reiterate that it is trite that an appeal is a continuation of proceedings by way of rehearing and an appeal court may

subject the evidence to a critical re-examination – see *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579. Earlier Zulkefli Makinuddin FCJ (as he then was) in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, stated:

> I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct (see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122).

We took this approach in deciding these appeals before us given that the grounds of decision of the learned judge appears to be most cursory.

[26] Reverting to both the appellants' unsworn statements, it is trite law that unsworn statement from the dock is not evidence and the accused cannot be cross-examined on his unsworn statement (see *Public Prosecutor v Sanassi* [1970] 2 MLJ 198). In *Wong Heng Fatt v Public Prosecutor* [1958] 1 LNS 96, Smith J said as follows:

> I do not consider that a statement by an accused person from the dock is evidence in view of the provisions of s 4(1)(a) of the Oaths and Affirmations Ordinance 1949, the essential part of which reads '... oaths shall be taken by ... witnesses, that is to say, all persons who ... give evidence ... before any court ...'. Since the appellant was not sworn or affirmed, he did not give evidence.

[27] Given that unsworn statement is not evidence, the corresponding issue is what weight is to be attached to such a statement? On account that an accused person cannot be cross-examined on his unsworn statement, it follows that the other party has no means to verify its veracity. The statement thus could not be tested against the vagaries of cross-examination. In such event, such a statement cannot carry the same weight as opposed to evidence given in the witness box under oath wherein the other party will have a field day cross-examining the accused until the cows come home subject only to the issues of relevancy and admissibility. Evidentially, it carries little weight. Ariffin Zakaria CJ hence fortified the obvious in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293 at p 343; [2015] 2 CLJ 145, at p 199, para 202:

> ... In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge (*Lee Boon Gan v Regina* [1954] 1 MLJ 103; [1954] 1 LNS 39; *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39 ; [1961] 1 LNS 146; *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104; [1968] 1 LNS 80; and *Juraimi bin Husin v Public Prosecutor; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383).

[28] We were of the further view that for what it is worth the unsworn statements must be evaluated by the trial judge although it may not be, strictly speaking, evidence and at the end of the day conclude whether though of little weightage, it has not or it has nevertheless created a reasonable doubt upon the prosecution's case or if a presumption has been invoked to operate to their disfavour, it has rebutted the said presumption. This requires a very convincing statement though.

EVALUATION OF BOTH THE APPELLANTS' DEFENCE

[29] To recapitulate the learned judge concluded that the assertions of both the appellants could not possibly be true (*tidak mungkin benar*) and no reasonable doubt has been created upon he prosecution's case on account that they were no mere simpletons, that the falsity of their statements from the dock could not be ascertained for want of cross-examination and that the evidence revealed that the attempt to conceal the drugs in the ceiling was done by the second appellant and not the third accused.

[30] As regards to the unascertainability of the falsity of their statements for want of cross-examination raised by the learned trial judge, we however would rather think that the correct approach should be that the veracity of their statements could not be ascertained for want of cross-examination, regard being had to the surrounding circumstances and other available evidence that may corroborate their statements.

[31] We found that the evaluation of the said statements by the learned judge again, is indeed rather cursory.

[32] Be that as it may, we found that the evidence is overwhelming to support the findings of the learned judge that no reasonable doubt has been created by the defence.

[33] Most glaringly their core defence that the drugs belonged to the third accused and the exercise to shift the entire culpability upon the third accused in no uncertain terms as particularised in paras 9.7–9.14 and paras 10.5–10.14 above were not put to the prosecution witnesses in particular the officers involved in the raid ie SP8 (Mohd Janid bin Ramli) and SP11 and also the IO, SP12. Their defence were grossly not in alignment with the tenor of their cross-examination.

[34] Both SP8 and SP11 testified that they saw the second appellant standing on the toilet bowl inside the bathroom trying to conceal the drugs in the ceiling of the bathroom and was promptly arrested therein. However it was not put to these two witnesses that it was the third accused who was in there

trying to conceal the drugs, consistent with their statements. Equally the second appellant did not challenge that it was not him that was arrested in the bathroom but the third accused.

[35] Being the core of their defence we would expect that these issues (as in paras 32 and 34 above) should be featured prominently in the cross-examination of SP8, SP11 and SP12. Apart from their own testimonies, their defence can equally be ascertained from the line of cross-examination of the prosecution witnesses. It is also incumbent upon the defence to put forth their case at the earliest possible stage.

[36] Both the appellants' failure to do so had occasioned a breach of the rule of essential justice, as apart from springing surprises, it also leaves no room for rebuttal, denial or explaination by the prosecution witnesses. In *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, the Federal Court, at p 218, stated:

> Speaking generally, in criminal trial, the whole point and purpose of the defence having to put its case as might be in position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, 'kept up its sleeve', as it were revealed for the first time when the accused makes his defence from the witness box or dock, thus detracting from the weight to be accorded to the defence.

In our view, there has been a belated disclosure of the defence which suggested concoction.

[37] Both the appellants claimed that they swallowed the capsules upon the suggestion of the third accused as they believed in the third accused's assurance that the same were medicine that could give them energy. However we think that they could not be so naive to swallow the medicine with the plastic wrappings intact. It is elementary, even to a simpleton, that medicine is not taken with its plastic wrappings intact and not in six or five capsules at one go. In our view both the appellants verily knew what exactly they were swallowing.

[38] In his statement, the first appellant stated:

> And Behnam told us this medicine give an energy to people when they are really tired and this medicine is from Malaysia. And you cannot find this in Iran. Behnam told us you can try it if you do not believe me but be careful you should not have more than six capsules per day. And he gave us six capsules before we go out and enjoy in Kuala Lumpur.

Meanwhile, the second appellant stated:

A He gave us that medicine and he said if you want to know you can try that I am telling the truth or not. Rasoul and I decided to try the medicine. Behnam gave us six capsules and we took them. We had really nice night and we enjoyed.

B **[39]** We paused to conjecture when exactly did this 'had really nice night and we enjoyed' event take place. They arrived in Kuala Lumpur and registered themselves at Corus Hotel on 15 April 2010 and by 4.25pm on the same day they were arrested by the police in their room. Chronologically from the time line, the event could not have taken place. It fortified our view that their statements that the drugs belonged to the third accused and it was the third C accused who brought the drugs into the room and giving them several capsules to consume were mere concoctions laced with elements of afterthought.

D **[40]** In such event it is quite safe to infer that both the appellants themselves brought the drugs with them and somehow was fortunate enough to avoid detection by the authorities at the point of entry into this country.

E **[41]** We have re-evaluated both the appellants' unsworn statements, consistent with the principles enunciated in *Ahmad Najib bin Aris v Public Prosecutor*. For all the reasons enumerated at paras 25–40 (above) we found both the appellants' statements most unsatisfactory and most unconvincing, incapable of being given any weightage let alone raising a reasonable doubt.

F **[42]** Both the appellants canvassed a very opportunistic defence by taking full advantage of the third accused's acquittal at the end of the prosecution's case and heaped the entire culpability and misfortune singularly upon the third accused. It is certainly a defence of afterthought, concoctions and recently invented all combined together, grounded and crafted upon the third accused's G acquittal who is no longer in the arena to give his version of the facts and events and where the learned judge had ruled that there was no evidence to implicate him with the said drugs nor any indication that he had harboured a common intention with the appellants to traffic in the said drugs. Their defence is neither consistent with their innocence nor were there circumstances H corroborating their statements to warrant our attention.

[43] The submission of learned counsel for the second appellant that if the appellants had indeed carried the drugs with them from Iran, they would have been discovered while at the airport itself when going through the scanners at I the customs checkpoint has no basis and is purely speculative. It is grounded upon the assumption that once one goes through the customs checkpoint, then illegal goods carried by him must be detected/discovered. This may hold true if there is a 100% check upon each and every traveller coming into the country. However, we took judicial notice that this is not the case in our airports. It is

humanly impractical to do so. Even if there is a 100% check, there is no guarantee that no one will escape detection.

THE FIRST APPELLANT'S ADDITIONAL GROUND OF APPEAL

[44] It is not disputed that the drugs were found at two different locations. One plastic bag containing 112 plastic capsules was found in the third drawer of the TV cabinet (exhs P3B1–P3B112) and the other plastic bag containing 112 plastic capsules was found in the ceiling of the bathroom (exhs P4B1–P4B112). Learned counsel for the first. appellant submitted that this give rise to two different factual matrixes which each factual matrix should have been separately considered by the learned judge. This the learned judge had failed to do and such failure amounted to a misdirection.

[45] We found no merit in the submission. The bathroom was adjacent to the bed in the same room and the TV cabinet was not far from the bed. The drugs were found in the same room though at two different locations but very proximate to one another. The hard evidence showed that the first. appellant was the registered guest of the said room who brought along the second appellant to put up with him. Both appellants were in full control, management, have exclusive use and access of the room.

[46] Both the appellants were in the room at the time of the police raid. Both the appellants were found in close proximity with the said drugs and both were charged with a common intention to traffic in the said drugs.

[47] In our view the discovery of the drugs which is so proximate in terms of time and location that it could not but must constitute and must be considered as one factual transaction. There is only one factual matrix of the case. Hence there is no necessity to have a separate consideration of the same as suggested by learned counsel.

CONCLUSION

[48] We were on all fours with the findings of the learned judge. The defence has failed to raise a reasonable doubt upon the prosecution's case and the prosecution has proved its case beyond reasonable doubt against both the appellants on the charge as proffered against them. We dismissed their appeals and affirmed the convictions and sentences imposed by the High Court.

Appeals dismissed.

Reported by Kohila Nesan